

Ya bin Daud v Public Prosecutor

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HIGH COURT (KOTA BHARU) — CRIMINAL APPEAL NO 42-30-94
NIK HASHIM JC
31 JANUARY 1996

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Criminal Law — *Penal Code (Malaysia)* — s 96 — *Private defence* — *Limit of* —
Whether the fact that accused was the cause of the attack on himself relevant

On 18 December 1993, the accused fought with, and seriously injured, one Yaacob bin Deris ('SP5'). On his way home, the accused was confronted by the deceased (the younger brother of SP5) and one Mat Akib ('SP10' who was the nephew of SP5), both of whom were armed. The accused rushed home and armed himself with a 'golok' to fend off his attackers. Fighting ensued and the deceased was fatally wounded on his head and died at the scene. The accused surrendered himself to the police when they arrived. The accused was convicted and sentenced to imprisonment by the sessions court. He appealed against both the conviction and sentence and pleaded private defence.

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Held, allowing the appeal:

- (1) The right of private defence commences as soon as there is reasonable apprehension of danger to the person of the accused and the right continues as long as the apprehension of such danger continues (see p 325G-I); *PP v Ngoi Ming Sean* 11982] 1 MLJ 24 followed.
- (2) Where a reasonable apprehension of danger exists, the accused is not obliged to retreat but may pursue his adversary till he finds himself out of danger, and if in a conflict between them, he happens to kill, such killing is justifiable (see p 326A-E); *Musa bin Yusof v PP* [1953] MLJ 70 and *Jai Dev v State of Punjab* AIR 1963 SC 612 followed.
- (3) It is not necessary for the accused to find himself afflicted with serious injury before the exercise of the right of private defence is justified (see p 326C-B); *Govindan Neelambaran v State of Kerala* AIR 1960 Ker 258 followed.
- (4) The accused had more than a reasonable apprehension of death or grievous harm when he was cornered, alone, by his attackers. The attackers created a dangerous situation on his life in which he had no time to reflect but to retaliate to save himself. The appellant had acted within his right in order to defend himself and was not in excess of that right. It was immaterial that the accused was the source of his own attack by virtue of the harm inflicted on the brother of the deceased. Nor was it material that the accused was a silat instructor and younger than both his attackers (see p 328D-F).

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A [Bahasa Malaysia summary]

Pada 18 Disember 1993, tertuduh telah berlawan dan mencederakan seorang bernama Yaacob bin Deris ('SP5'). Ketika pulang ke rumahnya, tertuduh telah dihadapi oleh si mati (adik SP5) dan seorang bernama Mat Akib ('SP10' iaitu anak saudara SP5). Kedua-dua mereka mempunyai senjata. Tertuduh telah bergegas ke rumahnya dan telah melengkapkan diri dengan sebilah golok untuk mempertahankan diri dari penyerangnya. Mereka kemudiannya berlawan dan si mati telah mengalami kecederaan pada kepalanya yang membawa kematiannya di tempat kejadian itu. Tertuduh telah menyerah diri kepada polis apabila mereka tiba di tempat kejadian. Tertuduh telah disabit kesalahan dan dihukum penjara oleh mahkamah sesyen. Dia telah merayu terhadap kedua-dua sabitan dan hukuman dan telah mengemukakan pembelaan persendirian.

Diputuskan, membenarkan rayuan:

- D** (1) Hak pembelaan persendirian bermula sebaik sahaja terdapatnya perasaan bahaya yang munasabah oleh tertuduh dan hak tersebut berterusan selama perasaan bahaya tersebut berterusan (lihat ms 325G-I); *PP v Ngoi Ming Sean* [1982] 1 MLJ 24 diikuti.
- E** (2) Di mana perasaan munasabah akan bahaya itu wujud, tertuduh tidak mempunyai kewajiban untuk berundur diri tetapi dia boleh mencabar musuhnya sehingga dia tidak lagi berada dalam bahaya, dan jika di dalam satu perkelahian di antara mereka, beliau melakukan pembunuhan, pembunuhan sebegitu adalah beralasan (lihat ms 326A-E); *Musa bin Yusof v PP* [1953] MLJ 70 dan *Jai Dev v State of Punjab* AIR 1963 SC 612 diikuti.
- F** (3) Adalah tidak perlu untuk tertuduh mendapati beliau mengalami kecederaan sebelum penggunaan hak pembelaan persendiriannya dijustifikasikan (lihat ms 326C-B); *Govindan Neelambaran v State of Kerala* AIR 1960 Ker 258 diikuti.
- G** (4) Tertuduh mempunyai perasaan bahaya yang lebih daripada munasabah bahawa beliau akan didatangi kematian atau kecederaan teruk ketika dia seorang dihalang oleh penyerangnya. Penyerang-penyerangnya telah mengakibatkan suatu keadaan merbahaya terhadap nyawanya di mana tertuduh telah tidak mempunyai masa untuk berfikir tetapi hanya untuk menyerangbalas untuk menyelamatkan dirinya. Tertuduh telah bertindak dalam lingkungan haknya supaya mempertahankan dirinya dan tidak melebihi hak itu. Ianya tidak penting bahawa tertuduh sendiri adalah punca serangan tersebut disebabkan kecederaan yang dilakukannya ke atas abang si mati. Juga adalah tidak penting bahawa tertuduh merupakan guru silat dan adalah lebih muda daripada penyerang-penyerangnya (lihat ms 328D-F).]
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Notes

For cases on private defence, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 782–784.

Cases referred to

Govindan Neelambaran v State of Kerala AIR 1960 Ker 258 (folld)

Jai Dev v State of Punjab AIR 1963 SC 612 (refd)

Musa bin Yusof v PP [1953] MLJ 70 (refd)

PP v Ngoi Ming Sean [1982] 1 MLJ 24 (folld)

Raman v PP [1948–49] MLJ Supp 146 (refd)

Legislation referred to

Penal Code (FMS Cap 45) ss 96, 304

Mohd Apandi bin Ali (*Apandi Ali & Co*) for the appellant.

Mohd Dusuki bin Haji Mokhtar (Deputy Public Prosecutor) for the Public Prosecutor.

Cur Adv Vult

Nik Hashim JC: The appellant was convicted by the sessions court at Kota Bharu on a charge of culpable homicide not amounting to murder of one Yusof bin Deris on 18 December 1993 at about 7pm at Kampung Sedar, Tumpat, an offence punishable under s 304 first limb of the Penal Code (FMS Cap 45) ('the Code'). The appellant was sentenced to seven years' imprisonment. The sentence however, was stayed pending appeal. He appealed against both the conviction and sentence.

The prosecution's evidence in the court below disclosed that at about 6 to 6.30pm on 18 December 1993, the appellant and the deceased's brother, Yaacob bin Deris ('SP5') were fighting at a 'sawah' not far from the accused's house. The fight was over SP5's cattle which the appellant alleged to have strayed and destroyed his crops. In the course of the fight, SP5 was seriously injured in his stomach with liver protruding out. SP5's family and relatives came to know about the incident. On his way home, the appellant was confronted by the deceased and one Mat Akib ('SP10'). The deceased was the younger brother of SP5, and SP10 was their nephew. The deceased was armed with a sword ('P7') whilst SP10 with a 'kelewang' ('P10'). On seeing this, the appellant rushed home. He asked for his 'golok' ('P6') from his wife ('SP15') which she gave him. According to her, the appellant was facing the deceased on his left and SP10 on his right. Together they attacked the appellant. The appellant was armed with P6. SP10 slashed the appellant with the kelewang on his left cheek and bled. On seeing blood, SP15 cried for help. However nobody came to her rescue. Meanwhile, SP10 and the deceased continued attacking the appellant. The appellant fought back. The fighting took place in the compound of the appellant's house. In the event, the deceased was fatally

- A wounded on his head and died at the scene. SP10 was seriously injured, while the appellant was wounded on his left face and right knee.

In the meantime, the police arrived and the appellant surrendered.

- B Learned counsel for the appellant En Mohd Apandi Ali submitted that because of the presence of group 'A' blood on the kelewang used by SP10 in the fight, and the blood was identical with the deceased's group 'A' blood, the appellant who was armed with the golok, which had insufficient blood for blood grouping, could not have caused the death of the deceased.

- C On this issue, the learned sessions court judge made a finding of fact that the appellant had caused the deceased's death with the golok.

In her evidence, Kelthum ('SP8'), the sister of the deceased said this: 'Saya nampak Ya lewa dan takil Jusoh.'

Whilst SP10 said in his evidence: 'Saya nampak Jusoh kena pedang Ya.'

- D Abdul Rahman bin Daud ('SP11') the brother of the appellant, said that the appellant used P6 in the fight. Investigation revealed that there was a lot of blood at the scene. According to the investigation officer, one ASP Mustapha Khan ('SP16'), there was a likelihood that the kelewang was stained with blood at the place. In my view, this is reasonable. SP10, who was armed with the kelewang, said that he was trying to help the deceased
- E who was then about to fall and was bleeding. Hence the blood on the kelewang. Apart from the fact that there was blood on the golok but insufficient for blood grouping, there was also evidence that the appellant stabbed the ground with the golok soon after the assault on SP10. This could, I think, explain the cause of the loss and disappearance of some of the blood on the golok. That being so, with respect, I agree with the
- F finding of the learned sessions court judge that it was the appellant who caused the death of the deceased with the golok.

Learned counsel for the appellant further submitted that the right of private defence is applicable in this case which makes the killing no offence under the Code.

- G Ajaib Singh J in *PP v Ngoi Ming Sean* [1982] 1 MLJ 24 explained the provisions of the right of private defence at p 25(H):

- H The Code provides that nothing is an offence which is done in the exercise of the right of private defence of a person's body. But there is no such right where the person has time to seek the protection of the public authorities. Nor will this right of private defence extend to the inflicting of more harm than is necessary for the purpose of defence. Subject to these limitations the right of private defence of the body extends even to the voluntary causing of death or any other harm to the assailant if the person who exercises his right of private defence is under a reasonable apprehension that death or grievous hurt would be caused to him by the assailant. The right of private defence commences as soon as there is reasonable apprehension of danger to the body and this right continues so long as such apprehension of danger continues (see ss 96 to 102 of the Code). And it goes without saying that the right of private defence ceases and is not available when there is no more apprehension of danger to the body.
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In the case of *Musa bin Yusof v PP* [1953] MLJ 70 the Court of Appeal held that: A

... The law in this country gives greater latitude to a person who is attacked than does the law in England. The question in such cases is not whether there was an actual continuing danger, but whether there was a reasonable apprehension of danger. If such a condition exists, the person attacked is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if in a conflict between them, he happens to kill, such killing is justifiable. B

Whilst in the case of *Govindan Neelambaran v State of Kerala* AIR 1960 Ker 258 the following passage appears in the judgment of the Court of Appeal: C

It is not necessary nor does the law require that the accused should wait till he receives a grievous injury for the purpose of exercising his right of private defence. In considering whether the accused is entitled to exercise the right of private defence, one has to place himself in the position of the accused in the midst of circumstances in which the accused stood and then form an opinion whether under the peculiar circumstances, the accused had not the apprehension of such injuries to his body as would entitle him to exercise his right. D

The Supreme Court of India made the following observations in the case of *Jai Dev v State of Punjab* AIR 1963 SC 612: E

The law of private defence does not require that the person assaulted or facing an apprehension of an assault must run away for safety.

The right of private defence is one of the general exceptions set out in Chapter IV of the Code, proof of which by virtue of s 105 of the Evidence Act 1950 ('the EA 1950'), rests on the accused, and the burden is not a heavy one. Spenser Wilkinson J in *Raman v PP* [1948-49] MLJ Supp 146, said: F

In criminal matters, whilst it is true that s 105 of the Evidence Enactment casts the burden upon an accused person of proving the existence of circumstances bringing the case within any special exception contained in the Code, it has always been held, not only that this burden is not a heavy one but also that the accused is entitled, if he can, to bring himself within the exceptions by reference to facts proved by the prosecution evidence. G

Having considered the provisions in the Code on the right of private defence, and its principles in the cases aforesaid, the court has to decide whether the appellant was acting under a reasonable apprehension that death or grievous hurt would be caused to him by the assailants. Whether the apprehension was reasonable or not is a question of fact. The weapon used, the manner of using it, the nature of assault and other surrounding circumstances are to be taken into account (*Ratanlal: The Law of Crimes* (22nd Ed) p 220). H

This case involved two families. It is not unnatural that each party was dissociating from the offence and blaming the other for the fight. In such a situation, it is incumbent on the trial court to scrutinize their evidence with care. In this case, it seems to me that the learned trial judge I

A dealt mainly with the evidence of SP5, SP8 and SP10 in his judgment without giving sufficient consideration to the evidence of SP11, SP13, SP14, SP15 and the appellant. To my mind, their evidence is equally important and relevant too, and unless for reasons to be recorded, their evidence is not to be disregarded.

B The learned deputy public prosecutor En Mohd Dusuki bin Hj Mokhtar in urging the court to dismiss the appeal submitted that the appellant was to be blamed for the fight as he had earlier injured SP5. Further, he was an expert in 'silat' and was the youngest and hence stronger than his assailants and as such the circumstances did not warrant him to exercise his right of private defence.

C On the day in question, the appellant was 40 years old, married with children, a farmer by occupation and a 'silat' instructor. The deceased was 49 years old while SP10 was 44. They lived in the same kampung. The deceased's house was about 237m away from the appellant's.

D According to the evidence the attack took place in the compound of the appellant's house. This fact was not in dispute.

E Learned counsel for the appellant submitted that SP10 and the deceased were trespassers and they were the ones who attacked the appellant first. The evidence showed that SP5 was injured in the fight earlier with the appellant. This triggered the subsequent fight between the deceased and SP10 on one side and the appellant on the other. What the deceased or SP10 should have done was to report SP5's injuries to the police. But they did not. They chose to attack the appellant. Perhaps, in their minds that was the best and the right course of action to be taken against the appellant at that time. They came uninvited and armed, SP10 with a sharp pointed kelewang, while the deceased with a long sword.

F According to appellant's wife, they chased the appellant with the weapons raised in their hands. The appellant said the deceased also uttered the word 'sabil' three times and called the appellant 'Firaun'. The appellant rushed to his house and got a golok from his wife. According to SP14, the appellant was cornered with the deceased on his left, SP10 on his right while SP8 behind him. SP11 and SP15 also said that the appellant was caught in between the deceased and SP10. In his evidence the appellant said under cross-examination at p 195 of record paras 40 to 46:

40 Mula-mula Mat Akib serang saya, kemudian Kelthum serang saya. Kemudian Yusof sampai. Mereka bergabung dan mengepong saya.

H 41 Bila saya berpaling lari, Kelthum tolak saya pergi ke depan.

42 Saya pergi ke depan, Yusof terus tetak saya di belakang beberapa kali.

43 Kelthum naik atas belakang saya dan saya pergi ke depan ke tempat Mat Akib dan Yusof.

I 44 Walaupun tubuh saya besar, Kelthum tolak saya, saya tersungkur ke depan.

45 Yusof tetak saya beberapa kali. Saya sanggah dengan golok serangan Yusof. Mat Akib tetak saya, saya berundur dan kelewang Mat Akib ke arah Yusof.

46 Kelewang Mat Akib tak berlaga dengan saya.

SP15 cried and shouted for help on seeing SP10 slashing her husband (the appellant) on his cheek. The deceased's sword was longer than the appellant's golok but the golok was somewhat of the same length as SP10's kelewang.

There are five blade cuts on the sword and the golok. These show that the weapons were used by the deceased and the appellant to strike and defend against one another. According to the appellant he used the golok to defend the blows of the deceased. I find the appellant's evidence consistent with the fact that he was attacked by the deceased. SP15 at p 139, paras 90 and 91 said: 'Yusof dan Mat Akib berlawan dengan Ya. Mereka menggunakan senjata.' SP14 in his evidence at p 124 para 13 said: 'Jusoh sedang bertakil dengan Ya pada masa itu.' Together they attacked the appellant, and the appellant being alone and cornered in his own compound and coupled with the crying of his wife, I find that at that point of time, the appellant had more than a reasonable apprehension of death or grievous hurt at the hands of the deceased and SP10. He need not wait till he receives a grievous injury before he can exercise his right of private defence. There was no way out for the appellant to escape as he was surrounded by SP10, the deceased and SP8. He was entitled to defend himself the best way he could. The benefit of right of private defence equally applies to him, regardless of whether he was a silat instructor and was younger or even stronger than the deceased or SP10. The attack by the deceased and SP10 had indeed created a dangerous situation on his life that he had no time to reflect but to strike back. His only concern then was, 'matilah aku' (para 118, p 190 of record). Unfortunately his act caused the death of the deceased and seriously injured SP10. The court is sympathetic with the deceased, SP10, SP5 and their families. However, the court decides the case solely on the evidence before it and indeed it is its duty to see that justice is done in this case. The appellant had acted within his right in order to defend himself and was not in excess of that right. He ceased his right immediately after he was out of danger. He surrendered himself to the police.

By virtue of s 96 of the Code, I find the appellant, Ya bin Daud, not guilty and I allow the appeal. The conviction and sentence are to be set aside. I hereby order that the appellant be acquitted and discharged.

Appellant acquitted and discharged.

Reported by Chris Lin

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